April 1995

HONOR ROLL

426th Session, Basic Law Enforcement Academy - December 6, 1994 through March 1, 1995

President:	*Deputy Scott E. Wilson - Kitsap County Sheriff's Department*
Best Overall:	*Officer Calvin R. Nash, III - Richland Police Department*
Best Academic:	*Officer Calvin R. Nash, III - Richland Police Department*
Best Firearms:	*Deputy Ballard L. Bates - Spokane County Sheriff's Department*

****

Corrections Officer Academy - Class 207 - February 13 through March 10, 1995

Highest Overall:	*Officer Mindy Ann Elmer - King County Division of Corrections*
Highest Academic:	*Officer Mindy Ann Elmer - King County Division of Corrections*
Highest Practical Test:	*Officer Michael K. Daley - Airway Heights Correctional Center*
Highest in Mock Scenes:	*Officer Steve M. Bozarth - Pine Lodge Pre-Release* *Officer Juan G. Hall - McNeil Island Correctional Center*
Highest Defensive Tactics:	*Officer James E. Bucsko - Okanogan County Correctional Facility*

****

Corrections Officer Academy - Class 208 - February 13 through March 10, 1995

Highest Overall:	*Officer Jerry S. Johnson - King County Division of Corrections*
Highest Academic:	*Officer Jerry S. Johnson - King County Division of Corrections*
Highest Practical Test:	*Officer Brian E. Williams - Washington Corrections Center*
Highest in Mock Scenes:	*Officer Christopher G. Hicks - Washington State Penitentiary*
Highest Defensive Tactics:	*Officer Brian K. Preato - King County Division of Corrections*

****

APRIL LED TABLE OF CONTENTS

****

WASHINGTON STATE COURT OF APPEALS

TERRY STOP -- INCLUDING DIRECTIVE TO UNBELTED PASSENGER TO STEP FROM CAR -- UPHELD; ALSO, 1993 FIREARMS LAW CHANGE SURVIVES "EX POST FACTO" CHALLENGE

State v. Watkins, 76 Wn. App. 726 (Div. I, 1995)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> On July 3, 1993, Seattle Police Officers Kevin Andrews and Steven Dosch were on foot patrol in the area of 3rd and Yesler in Seattle. A car came toward them on Yesler with a mangled, unreadable front license plate. The officers motioned the car over to the side of the street. As the car approached them, the officers saw Watkins sitting in the front passenger seat and leaning forward as if to place something under the seat.
>
> After the car stopped, Andrews approached the driver's side of the car and Dosch approached the passenger's side. Neither Watkins nor the driver of the car, Venice Willis, was wearing a

> seat belt. The officers asked Willis and Watkins for identification. Willis had identification, but Watkins did not. Andrews asked Willis to identify Watkins. She told the officers that Watkins was her nephew. Watkins, however, stated that he was not her nephew. The officers asked Watkins to step our of the car. Watkins began moving his arms around and claimed that the car door was jammed. Dosch approached the door and told Watkins that he would open the door from the outside. Dosch opened the door and saw the butt of a revolver between the passenger's seat and the door frame. Dosch took Watkins into custody. He then retrieved the gun and found that it was fully loaded. Dosch also found a box of ammunition between the passenger's and driver's seats. Watkins was charged with violating RCW 9.41.040, which prohibits possession of a short firearm or pistol by a juvenile who has previously been convicted of a felony violation of the Uniform Controlled Substances Act (VUCSA).

ISSUES AND RULINGS: (1) Did the seizing officer exceed the permissible bounds of a Terry stop when he directed passenger Watkins to get out of the car? (ANSWER: No, the totality of the circumstances justified the action); (2) Did it violate constitutional "ex post facto" protections for the State in 1993 to add a new disqualifier crime to the firearms law at RCW 9.41.040 and make the new disqualifier applicable to crimes committed before 1993? (ANSWER: No) Result: affirmance of King County Superior Court conviction for violation of RCW 9.41.040.

ANALYSIS:

(1) REASONABLENESS OF INVESTIGATORY SEIZURE

The Court of Appeals analysis of the Terry stop issue, in part, is as follows:

> The evaluation of the reasonableness of an investigative stop involves a two-step inquiry: (1) whether the initial interference with the suspect's freedom of movement was justified at its inception and (2) whether it was reasonably related in scope to the circumstances which justified the interference in the first place. The trial court found that the officers had valid concerns regarding their safety and held that the request that Watkins leave the car was reasonable based on his furtive movements, Watkins' lack of identification and the confusion over the relationship between Watkins and Willis.
>
> The officers clearly had authority to ask Watkins to exit the car and search the area within his immediate control for weapons based on Watkins' furtive movements alone.

[Citation omitted]

In support of its conclusion that the officers had authority to direct Watkins out of the car under these circumstances, the Court cites State v. Kennedy, 107 Wn.2d 1 (1986) **Dec. '86 LED: 01** and State v. Wilkinson, 56 Wn. App. 812 (Div. I, 1990) **Oct. '90 LED:03**.

The Court then goes on to rule that the gun came into "plain view" when Watkins opened the door, and that the gun was therefore lawfully seized.

(2) EX POST FACTO ISSUE

The Court's analysis of the ex post facto issue is as follows:

RCW 9.41.040(4) provides that, except under provisions not applicable here,

> a person is guilty of the crime of unlawful possession of a short firearm or pistol if, after having been convicted or adjudicated of any felony violation of the uniform controlled substances act, . . . the person owns or has in his or her possession or under his or her control any short firearm or pistol. **[LED EDITOR'S NOTE: The statute was amended in 1994 to prohibit possession of any firearm in this and other specified circumstances.]**

Watkins challenges his conviction on the ground that this provision is unconstitutional as applied to him because it constitutes an ex post facto law. Watkins was found guilty of the predicate offense, a felony VUCSA, on February 5, 1992. He was found guilty of the VUFA charge on July 8, 1993. In the interim, the Legislature amended RCW 9.41 to include the provision under which Watkins was charged. He contends that the statute may not be constitutionally applied to him because it enhances the punishment for a crime he already committed.

A law violates the prohibition against ex post facto laws if it "'punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime of any defense available according to law at the time when the act was committed'." Watkins is correct that a statute increasing or enhancing punishment for a crime committed before the effective date of the statute is an unconstitutional ex post facto law. The statute involved here, however, does not enhance Watkins' sentence because it did not alter or increase punishment for an existing crime. Rather, the provision of the statute under which Watkins was charged created a new substantive offense, i.e., possession of a short firearm or pistol by an adult or juvenile who has previously been convicted of a felony VUCSA. Although Watkins committed the predicate offense before the statute became effective, he committed the crime which constituted a violation of the firearms statute after the amendment became effective. Thus, as applied to Watkins, the statute neither increased the punishment for a crime already committed nor did it impose punishment for an act that was not punishable when committed. It is not a prohibited ex post facto law.

[Some citations omitted]

LED EDITOR'S COMMENTS:

(1) OFFICER-SAFETY QUESTION

We will re-state in part our comment on a recent case -- State v. Cole, 73 Wn. App. 844 (Div. III, 1994) September '94 LED:10 -- where the Court of Appeals had questioned an officer's decision to direct out of a car a passenger who was suspected of violating the seatbelt law. As in Cole, the Court in Watkins makes no mention of the holdings under U.S. Supreme Court and State Supreme Court precedents which allow officers total discretion to direct out of their motor vehicles drivers suspected of traffic or criminal law violations. See Pennsylvania v. Mimms, 434 U.S. 106 (1977) and State v. Kennedy, 107 Wn.2d 1, 9 (1986) Dec. '86 LED:01. Mimms is based on officer-safety concerns expressly recognized by the Court in that case, and the need for a "bright-line" rule for ease of police decision-making. Kennedy arguably adopts the Mimms rule. While the Cole and Watkins cases involved directives to passengers, as opposed to drivers, we think the situations are exactly parallel, and therefore, that the State Supreme Court and the U.S. Supreme Court would allow officers to order suspected passenger-violators out of their vehicles, without a requirement for articulated objective justification, under the same officer-safety rationale that supported the Mimms and Kennedy "bright line" rulings

as to suspected driver-violators.

On the other hand, the law is unclear on the question of an officer's authority to direct a passenger out of a vehicle where only the driver is suspected of a violation, and the passenger has done nothing (e.g., a furtive gesture) to indicate that he might be a danger to the officer. For cases going both ways on this latter question, see Professor LaFave's Treatise on the Fourth Amendment, Section 9.4(a). There are no reported Washington cases on the latter point, but in 1980 the State Supreme Court held in State v. Larson, 93 Wn.2d 638 (1980) Aug. '80 LED:01, under the Fourth Amendment, that police lack authority to routinely request identification from non-violator passengers under non-suspicious circumstances. We have strong doubts as to whether the U.S. Supreme Court would so interpret the Fourth Amendment, and we believe most courts in other jurisdictions would reject the Larson approach and allow the ID request as a de minimis intrusion. See e.g., Illinois v. Smith, 56 Cr.L. 1021 (1994) and Iowa v. Riley, 501 N.W.2d 487 (1993). However, Larson remains as a precedent in Washington, and it should be followed until and unless the State Supreme Court overrules it. The conservative legal advice in light of Larson is that police lack authority to routinely either: (A) ask non-suspect passengers for ID without expressly telling them that they need not comply, or (B) direct such non-suspect passengers to step from vehicles except for articulable, case-specific reasons.

(2) EX POST FACTO ISSUE

The ex post facto analysis in Watkins would also apply to the 1994 firearms statute changes, discussed in the June, July and August '94 LED's. Accordingly, Watkins supports the argument that the Washington Legislature's addition of new possession-disqualifing crimes in 1994 did not violate the ex post facto prohibition.

SEARCH OF VISITOR'S VEHICLE UNDER "ANY VEHICLES ON THE PROPERTY" PROVISION OF WARRANT FAILS FOURTH AMENDMENT PROBABLE CAUSE/PARTICULARITY TEST

State v. Rivera, 76 Wn. App. 519 (Div. II, 1995)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> On August 14, 1992, the Tacoma Police Department obtained a warrant to search a residence identified as 2003 221st Street Court East 5, in Forest Glen Mobile Estates located within Pierce County, Washington. The warrant also authorized the search of residents thereof known as Dorothy A. Earl, aka Dorothy A. Steadman, and a white female known only as Joy, "as well as other persons present, departing, and arriving [at] the residence at the time the warrant is being served". The warrant further provided that the search "include the full curt[i]lage of the described residence, as well as any vehicles on the property at the time the warrant is being served".
>
> After the warrant was issued and prior to its execution, the police maintained surveillance of the residence, during which they observed Rivera drive up in a white T-Bird automobile, leave the car, and enter the residence. About 2 hours later, when the police raid team moved in to serve the warrant, Rivera and a companion emerged. Rivera entered the driver's seat of a T-Bird automobile and his companion assumed the passenger seat. Rivera backed down the driveway, but his progress was blocked by the police raid van. After Rivera refused to get out of his vehicle, the police physically removed him, placed him on the ground, handcuffed him, and escorted him to the residence where he was advised of his Miranda rights. The police read the search warrant to Rivera and then searched his vehicle, seizing 38.6 grams of powder cocaine in individual baggies hidden in a twist top safe, designed to appear like a Coca-Cola can. The police also seized a pager located on the front seat, and in a follow up

search of his person, $240 in cash.

[Citation, footnote omitted]

ISSUE AND RULING: Did the search warrant's "any vehicle" provision satisfy the probable cause and particularity requirements of the Fourth Amendment and therefore allow the search of the visitor's motor vehicle? (ANSWER: No) Result: Pierce County Superior Court order denying suppression of evidence reversed, as is Rivera's conviction for possession of cocaine with intent to deliver.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The Fourth Amendment provides:
>
> > The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing the place to be searched*, and the persons or things to be seized. (Emphasis by Court)
>
> This amendment requires that prior to a search under a warrant, a magistrate or judge must first determine that probable cause exists for the search and the warrant must particularly describe the "place to be searched and the persons or things to be seized". This particularity requirements was designed to circumvent the abuse inherent in the writ of assistance to revenue officers commonly used in colonial times, allowing general searches, by empowering them in their discretion to search suspected places for smuggled goods.
>
> The amendment's requirement of particularity describing the place to be searched is equally important in controlling general searches. The amendment's requirements of probable cause and particularity in describing places to be searched and persons or things to be seized are inextricably interwoven. State v. Perrone, 119 Wn.2d 538 (1992)**[Nov. '92 LED:04]**. Perrone is a significant decision regarding the need for a particularity in drafting a search warrant for evidence of child pornography violations. The particularity requirement of the amendment has as one of its purposes the avoidance of warrants issued on loose, vague or doubtful bases of fact. By intertwining the requirement of probable cause and particularity in describing the place to be searched and items to be seized the clear mandate is that there must be probable cause that the described items to be seized are connected with criminal activity and that they are located in the place to be searched.
>
> . . .
>
> The intertwining of the concepts of particularity and probable cause provides a convenient framework to assess the presence or absence of probable cause in any search. Within this framework, it is readily apparent here that the issuing judge lacked probable cause to search Rivera or his vehicle. The affidavit does not identify Rivera by name or description. Neither does it identify the vehicle by license number or description. The issuing judge had absolutely no knowledge of the existence of Rivera or his vehicle, let alone any knowledge of Rivera's criminal activity or the use of his vehicle in a criminal enterprise. Similarly, the police had no knowledge of Rivera's existence or of his automobile until after the issuance of the warrant.
>
> The affidavit in support of the warrant does describe, in great detail, activity of numerous drug transactions taking place on the described premises. It also describes arrivals and

departures of various unidentified individuals using unidentified vehicles for the purchase or delivery of drugs. But nowhere is found a recital that Rivera or his vehicle was observed engaging in such conduct. It is obvious that in light of the extensive activity taking place at the described residence, a visitor's presence on the premises raises the suspicion that he or she is engaged in criminal activity. However, suspicion alone does not rise to the required standard of probable cause.

. . .

[COURT'S FOOTNOTE: A noted commentator questioning the wisdom of extending the search to vehicles on the premises, urges that such practice should be limited to vehicles under control of the owner of the searched premises.

It has often been held that a search warrant authorizing the search of certain premises covers automobiles found on those premises. The assumption seems to be that a vehicle should be viewed in the same way as any other personal effects found on the described premises. It is said, for example, that "it is no more necessary to describe a car on the premises than it would be to describe any other item of personal property in which the liquor might be stored." But the analogy is less than perfect. Certainly a vehicle, even one parked in a garage, has a lesser connection with the premises than "desks, cabinets, closets and similar items," and thus one might question whether a showing of probable cause as to certain premises should inevitably be deemed to cover a vehicle (even of the occupant) which happens to be parked on the property at the time the warrant is served. . .

. . . [T]he conclusion that a description of premises covers vehicles parked thereon should at least be limited to vehicles under the control of the person whose premises are described. . .

2 Wayne R. LaFave, *Search and Seizure*, §4.10(c) at 373 (2d ed. 1987).]

[Some citations omitted]

LED EDITOR'S COMMENT:

A PC/particularity question similar to that involved in Rivera may be presented if a search warrant contains an "all persons present" boilerplate clause. (We see no problem with a boilerplate "curtilage" provision.) While there are no reported Washington cases on point, the case law elsewhere indicates that unless the underlying affidavit shows that all persons present are likely to be in possession of the item sought (e.g., drugs), this search warrant clause purporting to authorize a search of "all persons present" cannot withstand scrutiny under the particularity/probable cause requirement of the Fourth Amendment. A description of a busy "crack house" or heroin "shooting gallery" might suffice, for some reviewing courts, though Division II wasn't impressed by evidence along these lines in Rivera.

Law enforcement agencies using boilerplate search warrants with "all vehicles on the premises" and "all persons present" clauses may wish to review this practice with their prosecutors/legal advisors. Upon review, agencies may decide, for instance, to change the "all vehicles present on the premises" boilerplate clause to "all vehicles subject to the direction or control of an occupant of the premises."

In addition, all search warrant execution teams will want to try to determine which people are mere visitors, as opposed to occupants, of premises to be searched. Mere visitors must be dealt with differently than occupants of a premises. For instance, while both visitors and occupants can lawfully be frisked if officers

reasonably believe they pose a danger to them or others, the law otherwise differentiates between the two types of "persons present." An occupant, even if not identified in the warrant, may be forcibly detained while the search is conducted. See Michigan v. Summers, 452 U.S. 692 (1991) Sept. '81 LED:01. A mere visitor, on the other hand, generally should be given an opportunity to leave before the search is completed, unless the officers have probable cause to arrest. Both, however, may be asked for voluntary consent to a search.

SEARCH WARRANT AFFIDAVIT DESCRIBING CITIZEN'S OBSERVANCE OF MARIJUANA GROW ESTABLISHES BASIS OF INFORMATION UNDER AGUILAR-SPINELLI PC RULE

State v. Creelman, 75 Wn. App. 490 (Div. I, 1994)

Facts:

Bruce W. Creelman was charged in 1992 with manufacturing a controlled substance. The charge was based on evidence police found executing a search warrant in Creelman's apartment. The search warrant was issued on the basis of an affidavit in which the officer-affiant declared in relevant part (as set out in the Court of Appeals opinion):

> Within the past 72 hrs a concerned citizen herein referred to as C.C. contacted officer Steve Uram of the Everett Police Dept. According to the C.C. he/she is sub-contracted by the Country Square Apts. He/she states that they went into Apt. C205 thinking it was C203. The C.C. was to be performing a job in C203. The C.C. then stated that as he/she walked into the apt. C205 he/she observed a marijuana grow-operation. The C.C. states that there were 4 or 5 plants and that they were mature. The C.C. adds that he/she is familiar with what growing marijuana looks and smells like. The C.C. also stated that there were growing lights on and that the C.C. is familiar with those as well. Officer Uram referred this information to your affiant Detective Todd Ballou of the Everett Police Narcotics Unit . . .
>
> . . .
>
> The C.C. has stated to Officer Uram that he/she wishes to remain anonymous for fear of reprisals. However, the C.C. has been fully identified to Officer Uram to include name, address, date of birth.
>
> Officer Uram has been a police officer for the city of Everett for 18 years. He has served in special investigations for 7 years and has written and served and assisted in serving numerous search warrants for narcotics to include marijuana.
>
> Your affiant has been a police officer for 5 years and a member of the Everett Police Narcotics Unit for 1 year. I previously was a member of a street narcotics unit for 1 1/2 years. I have received training in the identification of controlled substances. I have attended the DEA narcotics schools. I have also attended numerous training seminars in the investigation of growing marijuana. I have assisted in serving more than 50 search warrants for narcotics.
>
> Due to the information provided by the [C.C.], and the fact that the [C.C.] recognized the plants to be marijuana, I believe that the apt. #C205 of 702 W. Casino Rd. Everett, WA contains evidence that the crime of manufacturing of a controlled substance is taking place.

The trial court judge suppressed the evidence seized under the warrant. The trial judge ruled that the

affidavit established only the citizen's "personal belief" that he had observed marijuana but did not establish a sufficient basis for concluding that what the citizen had observed was actually a marijuana grow operation.

ISSUE AND RULING ON APPEAL:

Did the affidavit establish the "basis of knowledge" of the citizen's conclusion under the Aguilar-Spinelli two-pronged probable cause standard? (ANSWER: Yes) Result: Snohomish County Superior Court suppression order reversed, case remanded for trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> State v. Jackson, 102 Wn.2d 432 (1984) **[Nov. '84 LED:06]** adopted the 2-pronged test of Aguilar-Spinelli for evaluating whether probable cause is established through an informant's tip:
>
> > For an informant's tip (as detailed in an affidavit) to create probable cause for a search warrant to issue: (1) the officer's affidavit must set forth some of the underlying circumstances from which the informant drew his conclusion so that a magistrate can independently evaluate the reliability of the manner in which the informant acquired his information; and (2) the affidavit must set forth some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable.
>
> The first prong is known as the "basis of knowledge" prong and is satisfied if the informant declares "he personally has seen the facts asserted and is passing on firsthand information."
>
> If an informant's tip fails to satisfy either or both prongs of the test, an independent police investigation may establish probable cause if the results of the investigation corroborate the tip and support the missing elements of the test. However, in this case, no independent police investigation occurred before the magistrate issued the search warrant. Thus, the outcome of this appeal turns on whether the affidavit sufficiently set forth the concerned citizen's basis of knowledge. From our review of the case law, we conclude it did.
>
> In State v. Murray, 110 Wn.2d 706 (1988) **[Oct. '88 LED:07]**, the court held the basis of knowledge prong was "readily satisfied" where an informant told the officer-affiant that a friend had personally observed marijuana growing under grow lights in the defendant's basement, and that the defendant had told the friend the grow operation produced a monthly cash crop.
>
> In State v. Smith, 110 Wn.2d 658 (1988) **[Oct. '88 LED:04]**, an informant looked through a skylight and observed growing marijuana plants. A search warrant was issued based on the informant's observations and some additional information involving power usage at different property owned by the defendant. The court held that the informant's observations alone were sufficient to support a finding of probable cause. The Smith court relied on Jackson's holding that the basis of knowledge prong can be satisfied by showing that the informant "'personally has seen the facts asserted and is passing on firsthand information.'"
>
> In State v. Wolken, 103 Wn.2d 923 (1985) **[Aug. '85 LED:14]**, a search warrant affidavit was held sufficient to satisfy the basis of knowledge requirement of Aguilar-Spinelli because it recited that the informant stated he had been in the residence on two occasions and observed marijuana plants, approximately 2 feet tall, being cultivated in the back bedroom with

the use of halide grown lights and cardboard covered windows.

From the holdings of our Supreme Court in Jackson, Murray, Smith, and Wolken, it appears that an informant's basis of knowledge is sufficiently established in an affidavit if it states that the informant (or even a friend of the informant, as in Murray) personally saw marijuana plants or obtained other information firsthand. No additional information about the informant's ability to recognize marijuana was required in those cases.

Similarly, this court has held that while "the better practice would be for the affidavits to recite how an informant is qualified to identify the observed plants as marijuana", it was not error to issue a search warrant that did not include such information. State v. Berlin, 46 Wn. App. 587 (1987) **[May '87 LED:10]**. . . .

In the case now before us, the concerned citizen gave the police information he gained by personal observation. This, alone, satisfies the basis of knowledge requirement as discussed in Jackson, Murray, Smith, and Wolken. The concerned citizen in this case went even further, however, and stated unequivocally that he was familiar with the appearance and smell of growing marijuana. He described the plants that he observed as "mature", and he said he saw grow lights, with which he was also familiar, in operation.

While a statement describing the specific way in which the concerned citizen became familiar with marijuana and grow lights would be desirable in a supporting affidavit, even without that information a neutral magistrate could still conclude from the information given that the citizen's observations were sufficiently reliable to support a search warrant. If the police had asked the citizen the basis of his familiarity, and the citizen replied that a friend had previously identified marijuana for him, would the magistrate then possess significantly more useful information than that offered in the present affidavit? Probably not. Both statements present more of a conclusion than a verifiable fact. A citizen informant's claim of familiarity with marijuana is just as reliable as a claim that he is familiar with marijuana because of a friend's tutelage.

. . .

We hold the search warrant was valid in this case because the underlying affidavit stated the circumstances under which the citizen informant personally observed the marijuana grow operation, that the operation included mature plants and operating grow lights, and that the citizen informant was familiar with the appearance and smell of growing marijuana and with grow lights.

We therefore reverse the trial court's order suppressing the evidence and remand this case to the trial court for further proceedings.

[Some footnotes and citations omitted]

LED EDITOR'S COMMENT:

Despite the pro-law enforcement result in Creelman, we recommend, as we did last month in our comment about State v. Rose, 75 Wn. App. 28 (Div. I, 1994) March '95 LED:07-12, that officers preparing affidavits recounting a citizen's report of an observation of a marijuana grow explore with the citizen how he or she concluded that the plants observed were marijuana and should try to corroborate the report where the basis

for the conclusion seems too conclusory. Note that the State Supreme Court has accepted review in Rose.

RUSE TO GET RESIDENT TO OPEN DOOR LAWFUL -- REASONABLE SUSPICION NOT REQUIRED; ALSO, RCW 42.17.314 NOT APPLICABLE TO NON-GOVERNMENT UTILITIES

State v. Weller, 76 Wn. App. 165 (Div. III, 1994)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> An anonymous informant told a Spokane County Deputy Sheriff that Ronald Weller was possibly growing marijuana at S. 103 Ray. Deputy David Knechtel used law enforcement records to verify that Mr. Weller lived at that address. He then gave Washington Water Power a written form indicating an interest in the electrical power records for that address. The records provided in response showed a substantial increase in power usage beginning about 1 year earlier.
>
> Deputy Knechtel and another deputy went to the residence at S. 103 Ray and knocked on the door. A young man opened the door and Deputy Knechtel immediately smelled the odor of marijuana. He told the young man they were there to look for a table saw. The young man said they had the wrong address and they left.
>
> Deputy Knechtel prepared an affidavit setting forth the evidence of increased power usage at the residence and describing his visit to the residence. He obtained a search warrant for Mr. Weller's residence. Execution of the warrant resulted in the discovery of numerous marijuana plants, dried marijuana and equipment used to grow marijuana.
>
> Mr. Weller moved to suppress the evidence found in the search of his residence. The court ruled the written request for utility records failed to meet the requirements of 42.17.314 which limits law enforcement inspection of public utility records, and determined the power usage information could not be considered in determining the sufficiency of the affidavit. The court ruled the odor of marijuana provided sufficient grounds for a search warrant, the use of a ruse did not violate privacy rights because the deputy did not enter the home, and the evidence would not be suppressed.
>
> On the day of trial, Mr. Weller renewed his motion to suppress. The trial court ruled the consumption records were not obtained illegally because RCW 42.17.314 applies only to public agencies and Washington Water Power is not a public utility. Mr. Weller was convicted . . .

ISSUES AND RULINGS: Is Washington Water Power a "public utility" covered by RCW 42.17.314? (ANSWER: No); (2) Are power use records "private" under the Washington constitution, article 1, section 7? (ANSWER: The court declines to address this issue); (3) Was the use of a ruse to gain access to Fowler's home a "search" restricted under constitutional search and seizure rules? (ANSWER: No). Result: Spokane County Superior Court conviction for possession of a controlled substance with intent to manufacture affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) CONSTRUING POWER USE RECORDS STATUTE (RCW 42.17.314)

> Mr. Weller contends the trial court erred in ruling the sheriff's request for power consumption records was not subject to RCW 42.17.314. The statute requires a law

> enforcement authority who requests records which belong to a public utility district to provide a written statement that it "suspects that the particular person to whom the records pertain has committed a crime". By its terms, RCW 42.17.314 applies only to "public utility districts or municipally owned electrical utilities . . .". Washington Water Power is neither a public utility nor a municipally owned electrical utility. The statute does not apply.
>
> (2) CONSTITUTIONAL PRIVACY AND POWER USE RECORDS
>
> Mr. Weller contends the power use records should not have been considered in considering the sufficiency of the search warrant affidavit because they were obtained in violation of privacy interests which are protected by Washington's constitution. An appellate court will not decide a constitutional issue when the case can be decided on other grounds. Because the following issue is dispositive of the case, we do not reach Mr. Weller's constitutional argument.
>
> (3) CONSTITUTIONAL PRIVACY, USE OF RUSES
>
> Mr. Weller next contends the deputies' use of a ruse to gain access to his home was unlawful because they lacked a reasonable suspicion of criminal activity. A reasonable suspicion of criminal activity is not required to support the use of a ruse. State v. Hastings, 119 Wn.2d 229 (1992) **[Aug. '92 LED:07]**. Further, Deputy Knechtel did not enter Mr. Weller's residence. A front porch is not a constitutionally protected area; officers may enter a porch and detect the odor of marijuana without violating a resident's constitutionally protected right of privacy.

[Some citations omitted; subheadings supplied by LED Ed.]

INFORMANT'S PERSISTENCE IN EFFORT TO BUY DRUGS NOT ENTRAPMENT

State v. Trujillo, Chrisostomo, 75 Wn. App. 523 (Div. I, 1994)

Facts:

Skinner is a paid informant who the Seattle Police Department placed in a job in a private business at the request of the business owner. The business owner was concerned that his employees were dealing and using drugs on the job, and Skinner's job was to help police investigate.

During a one-week period, on at least three occasions, Skinner asked a fellow "employee," Chrisostomo, where Skinner could obtain some cocaine. Chrisostomo's testimony later was that on all occasions he said he was unable to help Skinner, but that he finally procured $250.00 worth of cocaine for Skinner simply because he figured that this was "the only way (he) could get (Skinner) to leave (him) alone."

Proceedings: (Excerpted from Court of Appeals opinion)

> Chrisostomo was charged with one count of delivery of cocaine. The State objected to the instruction on the defense of entrapment. The court removed the instruction over defense counsel's objection. The jury found Chrisostomo guilty as charged. He was sentenced to 21 months' imprisonment, the bottom of the standard range.

ISSUE AND RULING: Was there sufficient evidence to require defendant's proposed instruction on entrapment?

(ANSWER: No) Result: King County Superior Court conviction of Chrisostomo for delivery of a controlled substance affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Chrisostomo was not entitled to an instruction on the defense of entrapment unless he produced sufficient evidence to persuade a reasonable jury that he has established the defense by a preponderance of the evidence.
>
> A police informant's use of the normal amount of persuasion to overcome the defendant's expected resistance to sell drugs is not entrapment; nor is the use of deception, trickery, or artifice by the police. In order to show entrapment, a defendant must show more than mere reluctance on his or her part to violate the law. [State v. Enriquez, 45 Wn. App. 580 (1986) **Feb. '87 LED:06**] Accepting Chrisostomo's version of the facts as true, we nevertheless find that he failed to produce sufficient evidence to meet his burden of proof.
>
> In Enriquez, an informant met with the defendant six times during a span of 2 1/2 to 3 weeks. The informant told the defendant he knew someone who wanted to buy cocaine and suggested on numerous occasions that the defendant could better support his cocaine habit by selling drugs. Eventually, the defendant agreed to meet with the buyer who was an undercover officer. On appeal, the court affirmed the trial court's conclusion that the defendant had failed to establish a plausible defense of entrapment, stating:
>
> > The amount of persuasion used by the informant was not improper. He merely pointed out to Enriquez that he could better support his cocaine addiction by selling narcotics. The informant repeatedly made that suggestion before Enriquez agreed, but Enriquez was not badgered or pressured in any way.
>
> Unlike the informant in Enriquez, Skinner did not appeal to any weakness of Chrisostomo such as a drug addiction [COURT'S FOOTNOTE: The record contains no evidence that Chrisostomo was addicted to drugs.], or to his sympathies [COURT'S FOOTNOTE: Appeals to sympathy alone are not sufficient to establish entrapment. (State v. Smith, 101 Wn.2d 36 (1984))]. Rather, the record shows that Skinner simply asked Chrisostomo on three occasions whether he knew where he and his friend could get an eight-ball of cocaine. In Enriquez, the court concluded that the informant's behavior did not constitute badgering or pressuring. Skinner's behavior in the instant case involved a lesser degree of persuasion than the informant's in Enriquez. We find that the amount of persuasion Skinner used was not improper.
>
> Unlike in State v. Smith, the record shows that Chrisostomo never refused to obtain cocaine for Skinner. Rather, he kept telling Skinner he was unable to obtain any drugs, until he finally delivered the cocaine at the tavern. At most, Chrisostomo showed a reluctance to commit the crime, which is insufficient to establish entrapment.
>
> Further, in Enriquez, the court found that the 3 hours the defendant spent making connections with his supplier evidenced his predisposition to commit the crime. The record in the instant case shows that Chrisostomo also spent several hours arranging to obtain cocaine from his friend and investigating the price of an eight-ball, thus evidencing his predisposition.

In sum, we find that Chrisostomo did not present sufficient evidence to persuade a reasonable jury that he had established the defense by a preponderance of the evidence. By his actions, Skinner merely provided Chrisostomo with the opportunity to commit the crime of delivery of cocaine. This is not entrapment.

[Some citations, one footnote omitted]

USING FALSE ID TO RETURN MERCHANDISE, ALONE, NOT "FALSE IMPERSONATION"

Seattle v. Schurr, 76 Wn. App. 82 (Div. I, 1994)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

Paula Gray (Gray), a Nordstrom security agent, noticed Schurr in the Northgate Nordstrom. Suspicions of Schurr, Gray followed her as she walked through the store. She watched while Schurr returned a clothing item for a cash refund. A Nordstrom price ticket was attached to the merchandise. As Gray watched, Schurr completed a return document given to her by the salesclerk. Schurr then presented some sort of Washington State identification. The salesclerk then transcribed the number and address from the identification on the return document. When the return document was complete, the salesclerk gave Schurr $103 in cash.

Gray continued to follow Schurr through the store. Gray saw Schurr take five suits into a dressing room along with an empty shopping bag. When Schurr exited the dressing room, the shopping bag was full. Gray then searched the dressing room; she found four suits and one hanger. Gray followed Schurr as she quickly exited the store and drove away in a vehicle that had been waiting outside.

Gray immediately returned to the department from which Schurr had received the cash refund. She retrieved the refund document and discovered that Schurr had signed her name as Melanie McLain, which was the name on the identification that Schurr had presented.

Gray continued her investigation by telephoning Melanie McLain (McLain). From their conversation and from Gray's description of Schurr, McLain brought in a photograph of Schurr. Gray identified Schurr as the person who had signed Melanie McLain's name on the return document.

The City of Seattle (the City) charged Schurr with one count of theft and one count of criminal impersonation. . . .

At trial, Gray testified that Nordstrom requires the presentation of identification whenever an item is returned for cash. McLain testified that she and Schurr's sister, Melissa, were friends. McLain explained that she had lent her identification to Melissa so that Melissa could get into clubs because she was not of legal age. McLain testified that she had not given Schurr permission to use her identification.

The jury convicted Schurr of one count of criminal impersonation. However, the jury deadlocked on the theft charge and it was subsequently dismissed.

Schurr appealed her criminal impersonation conviction to the King County Superior Court, arguing that the evidence was insufficient to sustain the conviction . . .

ISSUE AND RULING: Was there sufficient evidence of an "intent to defraud" in Schurr's assumption of a false identity to support the "criminal impersonation" conviction under the Seattle ordinance (Note that in its principal portion the Seattle ordinance mirrors RCW 9A.60.040, but it does not include the definition of "intent to defraud" which was the focus of this appeal)? (ANSWER: No, the City did not prove "intent to defraud" because the City was unable to point to an identifiable economic interest of Nordstrom affected by Schurr's conduct) Result: Seattle Municipal Court conviction for false impersonation reversed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> As charged in this case, criminal impersonation requires proof of three elements: (1) the assumption of a false identity; (2) the commission of an act while assuming a false identity; and (3) the "intent to defraud another". Seattle Municipal Code (SMC) 12A.08.130(B)(1). SMC 12A.08.130(A) provides:
>
> > As used in this section, "intent to defraud" means the use of deception in Section 12A.08.050 B *with the intention to injure another's interest which has economic value*.
>
> SMC 12A.08.050(B), which sets forth six ways for "[d]eception" to occur, concludes "[t]he term 'deception' does not include falsity as to matters *having no pecuniary significance*." [Court's emphasis.]
>
> Schurr contends that the use of another's identification to return merchandise for a cash refund is, by itself, insufficient proof of the "intent to defraud". We agree. The City is unable to point to any identifiable economic interest that would be injured by the assumption of a false identity to return merchandise. Specifically, we are unable to discern *whose* interest and the *nature* of the interest that might be injured by such action. This is particularly true because: (1) there was no evidence that the returned merchandise was stolen or was not rightfully in Schurr's possession and (2) Nordstrom received its own merchandise in exchange for the $103 it refunded Schurr.
>
> The City, however, attempts to persuade us of two possible economic interests that would be harmed by Schurr's assumption of a false identity to return legitimate merchandise for cash. First, the City argues that it can be reasonably inferred that Nordstrom loses profit when merchandise is returned for cash. Because lost profits implicate Nordstrom's economic interests, the City asks us to infer that Schurr's having assumed a false identity to return legitimate merchandise for a cash refund evidences an intent to deprive Nordstrom of profit.
>
> We reject this argument. Even assuming that Nordstrom loses profit on cash returns, the City ignores the fact that *whenever* merchandise is returned for cash, regardless of whether false identification is presented or not, Nordstrom would lose profit. Certainly, "to injure another's interest which has economic value" means more than merely returning the retailer to its original position. Accordingly, the fact that Schurr assumed a false identity to return merchandise for cash is, by itself, insufficient to prove she acted with the intent to defraud.
>
> Second, the City argues that it can be inferred from the fact that Nordstrom has a policy requiring that identification be presented in order to receive a cash refund that Nordstrom has some economic interest in refunding the cash to the person whose identity was falsely assumed.

> The problem with this "inference" is that it requires us to make a leap unsupported by any evidence. The record is devoid of any facts showing the purpose of Nordstrom's identification policy. It is pure speculation that Nordstrom has some economic interest in ensuring that the person whose identity is falsely assumed receive the refunded cash. Consequently, we refuse to infer from the *mere existence* of Nordstrom's policy that a person who presents false identification to return legitimate merchandise for a cash refund did so with the intent to defraud.
>
> This would be a different case if the record indicated that Schurr's presentation of false identification was part of a larger scheme to defraud Nordstrom. However, in this case, the jury did not convict Schurr of the theft charge, and there was no basis from which one could infer that the use of false identification was intended "to injure another's interest which has economic value".
>
> In sum, the City has failed to identify any plausible economic interest that would be injured by the assumption of a false identity to return merchandise. Therefore, we conclude that no rational trier of fact could find that Schurr acted with the intent to defraud.

[Italics by Court; footnote omitted]

LED EDITOR'S COMMENT: **Because the Seattle ordinance contains a definition of "intent to defraud" not found in the state statute, RCW 9A.60.040, it is not clear whether the state statute would be interpreted similarly to the Seattle "criminal impersonation" ordinance at issue here. Our guess is that it would. Check with your prosecutor . . .**

"MARKET VALUE" IN THEFT CASE ESTABLISHED BY NON-NEGOTIABLE PRICES SET BY VICTIMIZED STORE, EVEN THOUGH NEIGHBORING STORE'S PRICES WERE SET LOWER

State v. Kleist, 74 Wn. App. 429 (Div. III, 1994)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> Ms. Kleist removed seven articles of clothing from the racks of The Bon Marché store in Spokane. She placed the clothing in a shopping bag she had removed from her purse, and left the store without paying for the items. She was detained by the store's security officer and later charged with one count of second degree theft, RCW 9A.56.040(1)(a).
>
> Before trial, the State moved to exclude testimony of a buyer from a nearby store, Nordstrom, showing the same items of clothing could have been purchased there for less than $250. The Nordstrom price, however, represented the "sale" or marked-down price of the items. The court ruled only evidence of retail prices at retail stores comparable to The Bon Marché would be admissible, and excluded the proposed evidence.

[Defendant was subsequently convicted of second degree theft. LED Ed.]

ISSUES AND RULINGS: (1) Did the trial court err in excluding the Nordstrom buyer's price testimony? (ANSWER: No); (2) Was the evidence sufficient to convict? (ANSWER: Yes.) Result: Spokane County Superior Court conviction for second degree theft affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) Excluding Nordstrom Prices

Second degree theft is theft of property which exceeds $250 in value. RCW 9A.56.040(1)(a). Value is defined as "the market value of the property . . . at the time and in the approximate area of the criminal act." RCW 9A.56.010(12)(a).

> "Market value" is defined in this state as the price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction.

. . .

The second degree theft statute applies to the theft of a variety of property from any source. When items are stolen from a retail establishment, the price at which the items are sold at that outlet will provide substantial evidence of their market value. State v. Farrer, 57 Wn. App. 207 (1990)**[Oct. '90 LED:09]**.

The value of an item at a particular retail outlet includes, in addition to the intrinsic value of the item, certain intangibles related to the specific outlet where the item is sold, including the store's reputation, ambience, and the nature and extent of precautions taken against shoplifting. Because these intangibles vary, the price at which the same goods are sold at another store is not relevant so long as evidence is available to establish their price at the store from which they were stolen. The court did not err in excluding evidence of the price at which the property was sold at a different store.

(2) Sufficiency of Evidence

Ms. Kleist also contends the evidence presented by the State was insufficient to establish the value of the property taken. . . . The State bears the burden of proving the value of the stolen property, and evidence in the form of price tags is insufficient, without more, to support a finding on the issue of value. However, price tags are sufficient evidence of value if an adequate foundation is laid as to a retailer's pricing procedures and the nonnegotiable status of the prices on the tags. **Farrer [See Oct. '90 LED:09]**.

Pam Brown, a division sales manager with the Bon Marché, testified in detail about the pricing system used by the store, including the manner in which prices are set and entered into a computer system using product codes. The security officer who detained Ms. Kleist testified he copied the product codes from the stolen property on a record kept by the store and determined the item prices using the store's pricing system. The store record was admitted in evidence and reflects the total value of the items. Ms. Brown testified the prices in the computer system are not negotiable. The evidence is sufficient to support the court's finding the items had a total market value of $299.

[Some citations omitted]

****

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **"MARKET VALUE" UNDER "THEFT" STATUTE ESTABLISHED BY TAGS ON STOLEN CLOTHING SETTING NONNEGOTIABLE PRICES, PLUS FOUNDATION TESTIMONY** -- In State v. Rainwater, 75 Wn. App. 256 (Div. I, 1994) the Court of Appeals rules in a theft case that the State adequately proved the "market value" of items shoplifted in a grab-and-run from Lamonts. The evidence on "market value" was as follows:

> McBride was the only State's witness who testified about the value of the stolen clothing . . .. Following normal store procedure, and with the assistance of store management staff, an itemized list (called an "evidence label") was compiled. McBride testified that the value of the clothing, as determined by the inventory, was $2,042.47. This value was determined based on the price tags which were attached to the stolen garments.

The Court holds on this evidence that the price tag on stolen merchandise constitutes substantial, but not conclusive, evidence of its market value under RCW 9A.56.010(12)(a). So long as the merchandise was stolen from a retail store, such as Lamonts, that is commonly known to sell its goods for a nonnegotiable price shown on the price tag, the price tag establishes market value. The status of a retail store as one commonly known to sell its goods for a nonnegotiable price shown on the price tag is subject to judicial notice; the Court takes judicial notice that Lamonts is such a retail store and that, for such a store, "market value" can be shown through bare testimony about price tags on stolen merchandise (subject to rebuttal evidence from defendant). In response to an argument from the defendant that establishing market value with price tags can lead to distortions of reality in cases of, for instance, stolen motor vehicles, the Court explains:

> It does not follow from this argument that a court cannot and would not take judicial notice that merchandising practices relating to cars are different from merchandising practices relating to retail clothing, groceries, and similar consumer goods usually sold for a nonnegotiable, tagged price. The rule we adopt today will not apply to new and used automobiles or to other merchandise for which the "sticker price" is merely a clue to the probable range for reasonable negotiations. Neither judges nor juries leave their common experience and common sense outside the courtroom door. Thus, we reject Rainwater's argument that the rule must be the same for retail clothing, groceries and automobiles.

Result: Affirmance of King County Superior Court first degree theft conviction.

(2) **EVIDENCE LAW IN TRAFFIC CASES -- FOUNDATION RULES FOR ADMISSIBILITY OF RADAR RESULTS EXPLAINED --** In Bellevue v. Lightfoot, 75 Wn. App. 214 (Div. I, 1994), in three traffic cases consolidated for appeal purposes, the Court of Appeals rejects three traffic violators' arguments, based on Seattle v. Peterson, 39 Wn. App. 524 (Div. I, 1985)**April '85 LED:16; May '85 LED:18)** that radar evidence is subject to the "Frye" test for scientific evidence. The defendants in Lightfoot argued unsuccessfully that radar results are not admissible in a traffic case unless the government shows that the engineering design of the particular radar device at issue is accepted in the scientific community.

Rejecting the Frye challenge, the Court of Appeals holds that police traffic radar results are admissible in a criminal prosecution if the particular radar device used is shown to be reliable by: (1) testimony of the police officer who used the device to measure the speed of the defendant's vehicle that the device was functioning properly when so used; and (2) testimony from a qualified expert that the device passed the requisite tests and checks to ensure its operational accuracy. Expert testimony that the engineering design of the particular radar device is generally accepted as reliable in the relevant scientific community is not required to establish a foundation for admission of the results of the device.

Result: King County District Court judgments on speeding convictions against John Strauss, Lynn Haskey, and William Murphy reinstated; David Lightfoot's case remanded for retrial because the King County District Court had improperly limited his cross examination of the government's radar expert.

(3) **COMMON LAW "MEDICAL NECESSITY" DEFENSE ADDRESSED IN MARIJUANA GROW CASE** -- In State v. Cole, 74 Wn. App. 571 (Div. II, 1994) the Court of Appeals agrees with defendant that the trial court erred in refusing to allow him to submit the common law defense of "medical necessity" to the jury in his prosecution for growing marijuana.

The Court of Appeals explains that a defendant charged with possession of marijuana and seeking to establish a defense of necessity must prove three things by a preponderance of the evidence: (1) the defendant reasonably believed that the use of marijuana was necessary to minimize the effects of a specific disease (the reasonable belief must be supported by corroborating medical testimony); (2) the benefits derived from the use of marijuana are greater than the harm sought to be prevented by the controlled substances law; and (3) no legal drug is as effective in minimizing the effects of the disease.

The Court of Appeals holds that defendant Cole, who claimed to be growing marijuana to use for back pain from a logging injury, submitted sufficient evidence on each of these prongs to submit his defense to the jury. NOTE: The Court's published opinion contains extensive discussion of both the law and the facts, but LED space limitations preclude further discussion here.

Result: Jefferson County Superior Court conviction for possession of a controlled substance with intent to manufacture or distribute reversed; case remanded for retrial with submission of medical necessity defense to the jury.

****

FEDERAL AGENCIES DEVELOP GUIDELINES ON SEARCHING, SEIZING COMPUTERS

A group of lawyers, agents, and technical experts from numerous federal agencies with law enforcement responsibilities have come up with a set of informal guidelines for searches and seizures involving computers. The guidelines address a wide range of matters, from basic definitions of computer-related terms to suggested language for inclusion in warrant applications. Their objective is to provide guidance to federal agencies and attorneys. However, while the informal guidelines focus on federal law requirements, much of the analysis of constitutional issues will be helpful to state and local law enforcement agencies as well. The 40-page guidelines can be found in the December 21, 1994 edition of the Criminal Law Reporter (56 CrL 2023-2062). County prosecutors should have ready access to the CrL Reporter.

The guidelines begin with a review of basic Fourth Amendment law, such as third-party consent search law, the exigent circumstances exception to the warrant requirement, and the requirement that warrants particularly describe the place to be searched and the things to be seized. The guidelines then discuss the application of these principles to computer search and seizure cases. The guidelines recommend that each component in a computer system be considered independently; thus, investigators should show an independent basis for seizing each separate component. Components may be contraband or fruits, instrumentalities, or evidence of a crime. Searching for and seizing information can give rise to more complex issues because of the special nature of computerized data. The guidelines' chapter on searching for and seizing information discusses such issues as privileges, whether to conduct the search on-site or elsewhere, and the use of experts in conducting searches.

The guidelines also address, among other things: the impact of the Federal Privacy Protection Act, 42 USC 2000aa, on searches of computer networks and bulletin boards, the Federal statutory rules protecting stored

electronic information; and procedures that should be followed after the search has been conducted. Appendices to the guidelines include a glossary and a list of federal experts for computer crime investigations.

****

1989-1993 LED SUBJECT MATTER INDEX ON WSCJTC COMPUTER BULLETIN BOARD

In the January 1995 LED at page 21, we announced that: (A) monthly LED's from 1992, 1993, and 1994 are available on the Criminal Justice Training Commission's computer bulletin board, and (B) all future LED's will be available on the bulletin board as of the first day of the month of publication. Now available as well on the bulletin board is the subject matter LED index for 1989 through 1993. We do not anticipate at this time that any other past LED's or past subject matter indexes will be made available. For instructions on use of the CJTC bulletin board, see page 50 of CJTC 1994-1995 Training Catalog (a copy of page 50 was appended to the January 1995 LED).

****

NEXT MONTH

The May '95 LED will include an entry on DOL v. Lax, 125 Wn.2d 818 (1995); in Lax the State Supreme Court holds in a pro-state ruling that the "refusal" of a BAC test under the implied consent statute is irrevocable, thus establishing a "bright line" refusal rule and reversing a Court of Appeals decision reported at 74 Wn. App. 7 (Div. II, 1994) **Oct. '94:14**.

****

The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions express the thinking of the writer and do not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.